No. 88 5746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BERNARD LEE HAMILTON, *Petitioner*

vs.

PEOPLE OF THE STATE OF CALIFORNIA, *Respondent*

Petition for Writ of Certiorari
to the Supreme Court of California

PETITIONER'S REPLY BRIEF

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I

PETITIONER WAS PREJUDICED WHEN THE CALIFORNIA SUPREME COURT IGNORED THE LIMITED SCOPE OF THIS COURT'S REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *ROSE V. CLARK*, SET ASIDE ITS PREVIOUS REVERSAL OF THE SPECIAL CIRCUMSTANCE FINDINGS IN PETITIONER'S CASE, AND AFFIRMED THE IMPOSITION OF THE DEATH PENALTY

In its reply to the petition for writ of certiorari, respondent apparently concedes that California Supreme Court was wrong in its assertion that this Court's remand for further consideration in light of *Rose v. Clark* (1986) 478 U.S. 570 rendered that court's decision in *People v. Hamilton* (1985) 41 Cal.3d 408 (hereinafter, *Hamilton I*) a "nullity." Instead, respondent rather lamely claims that petitioner suffered no prejudice when the California Supreme Court ignored the limited scope of this Court's remand and, instead, reconsidered the special circumstance findings made in appellant's case. Respondent claims that,

> "The reconsideration resulted in no change. Any error in considering the guilt phase again was potentially beneficial to petitioner. Consequently, no right of his was infringed in that he got a free second review of his convictions." (R.B. 11)

As Winston Churchill once said, "the exact opposite of the truth has never been stated with greater precision."

In its decision in *Hamilton I*, the California Supreme Court **reversed** the special circumstance findings that made petitioner death eligible, **set aside** the sentence of death, and ordered a new trial on the special circumstance issue. Following this Court's remand, in *People v. Hamilton* (1988) 45 Cal.3d 351 (hereinafter, *Hamilton II*), the California Supreme Court **affirmed** the special circumstance findings and **affirmed** petitioner's death sentence. It requires no citation of authority to assert that petitioner was prejudiced by the improper response of the California Supreme Court to this Court's remand.

Moreover, respondent's assertion that, "in view of the fact that all guilt phase issues had been affirmed[1]...petitioner got another bite

[1] This statement is not true. There are only two "phases" of a capital trial under California law. In the first "phase", the so-called "guilt phase," the jury resolves the question of whether or not the defendant is guilty of first degree murder, and if so, are there special circumstances attendant to the commission of the murder that would make defendant death eligible. If the jury finds the special circumstance allegations to be true, the "guilt phase" is followed by a "penalty phase." In *Hamilton I*, the California Supreme Court affirmed the finding of first degree murder, but **reversed** the special circumstance findings. Thus it is not accurate to state that, "all guilt phase issues had been affirmed."

at the apple" when the California Supreme Court reconsidered guilt phase issues[2] gives new meaning to the word "disingenuous." Following this Court's remand, both petitioner and respondent received a letter from the California Supreme Court requesting briefing,

> "on the effect, if any, of *Cabana v. Bullock* (1986) __U.S. __[106 S.C.t. 689], and *Rose v. Clark* (1986) __U.S.__ [54 U.S.L. Week 5023] on the above entitled case." (See Appendix)

Subsequently, both petitioner and respondent filed a series of briefs with and argued twice before the California Supreme Court. **Not once**, either in briefing or in argument, did petitioner, respondent, or the California court even mention, let alone discuss at any length, any guilt phase issues other than the impact of *Rose, supra* and *Cabana, supra*, on the California court's decision in *Hamilton I*.

Conclusion

Respondent concedes that this Court's remand did not render the California Supreme Court's decision in *Hamilton I* a nullity, but argues instead that petitioner was not prejudiced by the subsequent action of that court in *Hamilton II*. In fact, petitioner was prejudiced about as much as one can be; his sentence of death was reinstated.

The California Supreme Court misinterpreted this Court's remand, "for further consideration in light of *Rose v. Clark*." Given the obscurity of the leading decision of this Court explaining the meaning of such an order, the per curiam decision in *Henry v. City of*

[2] The only reference to other guilt phase issues in *Hamilton II* opinion is the following:

> "Pursuant to the mandate of the United States Supreme Court...we have reexamined that part of our former opinion dealing with the issues relating to guilt...Inasmuch as we deem it unnecessary to alter or amend our prior decision in that regard, we adopt it as our decision in this proceeding." 45 Cal.3d 351, 363

Rock Hill (1964) 376 U.S. 776,[3] given the ultimate prejudice suffered by petitioner as a result of the California Supreme Court's misinterpretation of that order, this Court should grant certiorari, not only to correct the manifest injustice done to petitioner, but to clearly explain the significance of an order remanding a case for further consideration in light of an intervening precedent of this Court.

[3] As noted in the petition for certiorari, that case has been cited only three times by lower courts in the twenty four years following that decision. (Pet. p.7)

II

PETITIONER'S REQUEST TO PERSONALLY PLEAD FOR HIS OWN LIFE AS HIS OWN LAWYER WAS UNCONDITIONAL, WAS TIMELY MADE, AND THE TRIAL COURT'S DENIAL OF THAT MOTION DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF

A.

Petitioner's January 6th Motion to Represent Himself was not Conditional.

On the very day that the verdict of guilty was returned by the jury, petitioner moved that, "the Court relieve counsel or in the alternative permit defendant to represent himself." (C.T. 1202) Respondent claims that this was merely "conditional" request which it seems to equate with "equivocal" request. Not so. As the Second Circuit observed in *Johnstone v. Kelly* (2nd Cir. 1986) 808 F.2d 214, 215, n.2

> "A request to proceed *pro se* not equivocal merely because it is an alternative position, advanced as a fall-back to a primary request for different counsel. *See Faretta v. California, supra,* 422 U.S. at 810 n.5, 835-36, 95 S.Ct. at 2529 n.5 *United States v. Denno* 348 F.2d 12, 14 n. 1, 16 (2d Cir. 1965), *cert. denied* 384 U.S. 10007, 86 S.Ct. 1950, 16 L.Ed.2d 1020 (1966)"

B.

Petitioner's Motion to Represent Himself was Timely.

Petitioner made his motion to represent himself at the penalty trial as soon as he became aware of the fact that there would be such a trial. The motion was made weeks before the penalty phase was set to begin. Respondent says that this motion to proceed *pro se* was untimely under California decisional law and asserts, without benefit of relevant citation, that the question of the timeliness of the assertion of the Sixth Amendment right to represent oneself at the penalty phase of a capital trial "is properly left to state law." (R.B. 14)

On the contrary, historically, this Court has jealously guarded federal constitutional rights from encroachment by state laws and

decisions that frustrate the exercise of those rights. As this Court observed in *Chapman v. California* (1967) 386 U.S. 18, 21

> "Whether a conviction for crime should stand when a State has failed to accord federally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by States of federally guaranteed rights."

See also *Green v. Georgia* (1979) 442 U.S. 95 Moreover, in analyzing the timeliness of the request to proceed *pro se*, the California court is not free to disregard this Court's holding in *Bullington v. Missouri* (1981) 451 U.S. 430, 437 that the penalty phase is, "itself a trial on the issue of punishment..." and substitute its own judgment, that it is merely, "a stage in a unitary capital trial." *Hamilton II*, 45 Cal.3d at 351

What if the California court had held that an assertion of the right to proceed *pro se* was untimely unless asserted at arraignment? Would this Court be required to defer to that evisceration of the Sixth Amendment right to proceed *pro se* because "timeliness" was a matter of state law?

C.

Petitioner's Conduct in Court was Never Disruptive

Respondent suggests that the denial of petitioner's motion to proceed *pro se* was in some way justified by his conduct during the trial. Nothing could be further from the truth. Throughout the four months of trial that preceded the guilty verdict, his behavior in court was exemplary; there was not a single improper outburst of any sort from petitioner.[4]

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[4] The reference to, "attack[ing] people in the court process at the jail" referred to an altercation that petitioner got involved in with jailers at the very beginning of the trial. Such conduct was not repeated and never spilled into the court proceedings.

The reference to "threatened to disrupt the court proceedings by attacking his attorneys or even the judge" also came at the very beginning of the trial and in his recitation to the trial court of what petitioner told assistant counsel, petitioner's lead counsel commented, "there is some dispute over whether or not Mr. Hamilton meant that at the time or it was a means that he was using to impress upon her his dislike for Miss Camberg and myself at that time..." (72 R.T. 32)

True, he did voiced complaints about his attorneys to the trial court, but he always did so at the appropriate time in an appropriate manner.

True, prior to arraignment in Superior Court, the magistrate deemed it proper to make substitutions of appointed counsel, but it would be circular reasoning of the worst sort to conclude that, because petitioner was disatisfied with his appointed counsel and the magistrate found sufficient merit to his complaints to warrant their substitution, petitioner in any way compromised his Sixth Amendment right to represent himself.

Conclusion

When the question before a jury is one of life or death, the right to represent oneself is at least as fundamental as it is when the question is one of guilt or innocence. The state should not be allowed to frustrate the assertion of that right following a guilty verdict in a capital case by interposing an objection of timeliness. This Court should grant certiorari to resolve this basic and important question of constitutional law.

III

THE INSTRUCTIONS OF THE TRIAL COURT COUPLED WITH THE PROSECUTION'S VOIR DIRE AND CLOSING ARGUMENT MISLED THE JURY CONCERNING THE CAPITAL PENALTY DETERMINATION IT HAD TO MAKE BY INFORMING THE JURY THAT THEY HAD NO CHOICE BUT TO VOTE FOR THE DEATH PENALTY IF THE FACTORS IN AGGRAVATION OUTWEIGHED THOSE IN MITIGATION EVEN IF, UNDER THOSE CIRCUMSTANCES, THE JURORS STILL FELT THAT DEATH WAS NOT THE APPROPRIATE PUNISHMENT

Respondent contends that, based upon the explanation of the law given in petitioner's case it was,

> "not possible for the jury to conclude the aggravating circumstances technically outweighed the mitigating yet it must return a death verdict even if it believed the lesser sentence was appropriate." (R.B. 17)

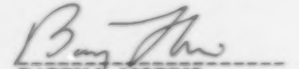
Respondent is wrong. A juror may well have concluded that even though the aggravating factors outweighed those in mitigation on a relative scale, on an absolute scale, the preponderance of aggravating factors did not justify imposition of the death penalty. For example, in a case where there was no evidence presented in mitigation, and some, but not very substantial, evidence presented in aggravation, even assuming that the jurors understood that were free to assign whatever weight they deemed appropriate to those factors, and even assuming that the jurors understood that they were to weigh and not merely count the factors on each side, a conscientious juror might well conclude that even though the evidence in aggravation outweighed that in mitigation, death was not the appropriate punishment. Yet if that same juror listened to and followed the law as stated in voir dire, instructions, and argument, that same juror would conclude that, according to the law as given to them in petitioner's case, a death sentence was his or her only option.

Moreover, respondent conveniently ignores the promises extracted by the prosecutor from the jurors in appellant's case during voir dire. Eleven out of twelve jurors if were told that aggravation outweighed mitigation, they would have no choice but to impose the death penalty. They were then asked if they would

promise to do that if that was the state of the evidence; when asked, they promised.

Clearly, the statutory scheme in California as applied in petitioner's case did not, "permit the type of individualized consideration of mitigating factors...required by the Eight and Fourteenth Amendments in capital cases. *Lockett v. Ohio* ((1978) 438 U.S. 586, 605

Dated: November 18, 1988



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Appendix

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July 25, 1986

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Re: Crim. 21958 - People v. Bernard Lee Hamilton

Dear Counsel:

The court requests briefing on the effect, if any, of Cabana v. Bullock (1986) ___ U.S. ___ [106 S.Ct. 689], and Rose v. Clark (1986) ___ U.S. ___ [54 U.S.L. Week 5023] on the above-entitled case. Simultaneous briefs are to be served and filed by August 14, 1986. Briefs in letter form will be acceptable.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

LPG:ew

cc: Herbert F. Wilkinson, Supervising Deputy Attorney General
California Appellate Project
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PROOF OF SERVICE BY MAIL

Petitioner's reply brief

I, Barry L. Morris, declare that I am a citizen of the United States of America, over the age of 18 years; my business address and place of business is 580 Grand Avenue, Oakland, California, 94610; and I am not party to the within action. On the date shown below, I deposited a true copy of the above-entitled document(s) in the mail in the City of Oaklan placing said document(s) in a sealed envelope with postage thereon full prepaid and addressed as follows:

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Executed on November 21, 1988 at Oakland, California

I declare under penalty of perjury that the foregoing is true and correct.